THE STRUCTURE OF HIGHER EDUCATION IN MONTANA:

MEANDERING THE MURKY LINE

Prepared by
Eddye McClure
Staff Attorney
Montana Legislative Services Division

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This legal memorandum is in response to a request by the Joint Subcommittee on Postsecondary Education Policy and Budget for background on the history of the Board of Regents and an analysis of the constitutional and statutory authority of the Board of Regents and the Montana Legislature over higher education. Part I will include a brief history of the governance of higher education under Article XI, section 11, of the 1889 Montana Constitution and creation of the Board of Regents under Article X, section 9, of the 1972 Montana Constitution. Part II will examine the Legislature's power of appropriation under both the 1889 and 1972 Montana Constitutions. Part III will include a discussion of major court decisions interpreting the authority of both the Board of Regents and the Legislature regarding higher education. Part IV will summarize the constitutional and statutory authority of the Board and the Legislature, summarize the pertinent case law, and address the actions necessary to increase state control over the Board of Regents of the University System. This memorandum is not intended as an exhaustive analysis of either the history of the Board of Regents or the appropriation power of the Legislature, but rather is intended to provide a brief overview of the history of the Board of Regents, the Legislative appropriation power, and the pertinent legal issues related to those constitutional powers.

Part I

History of Higher Education Governance

In 1884, leaders of the Montana Territory drafted a proposed state constitution that included the creation of a Board of Regents modeled after that adopted in 1874 by the state of California.[1] Under that proposal, a Board of Regents had general supervision over a University of Montana. Although the United States Congress approved the proposed 1885 Constitution as a prerequisite for statehood, the 1889 Montana Constitutional Convention rejected the formation of a Board of Regents, believing that authorizing multiple boards would lead to encroachment by technical and other schools on each other.[2] Instead, the 1889 Constitutional Convention created one State Board of Education responsible for all Montana public education.

Under the 1889 Constitution, the Governor was a member of the Board, which ensured Executive Branch oversight of higher education. Additionally, the framers made the Board dependent on the Legislature by adopting Article XI, section 11, of the 1889 Constitution, which provided:

> The general control and supervision of the state university and the various other state educational institutions shall be vested in a state board of education, ***whose powers and duties shall be prescribed and regulated by law***. . . . (emphasis added).

As a result, the Board of Education, although a constitutional entity, was nevertheless completely dependent on the Legislature for its powers and duties. Until the Legislature passed laws to implement the constitutional mandate, the Board was virtually powerless. In 1893, the Montana

Legislature, pursuant to its authority under Article XI, section 11, began enacting legislation that, among other things, outlined the powers and duties of the State Board of Education, granted the Board authority to oversee universities and elementary and secondary schools, statutorily determined the departments of the university, and legally mandated the course of instruction to be pursued.[3]

Section 17 of Montana's Enabling Act outlines lands granted by the federal government to the state for the purpose of establishing and maintaining some system of higher education, which included 100,000 acres for establishment and maintenance of a school of mines, 100,000 acres for state teachers colleges, commonly referred to then as "normal schools", and 50,000 acres for establishment and maintenance of agricultural colleges.[4] Pursuant to this grant, the 1893 Legislature authorized establishment of the College of Agriculture and Mechanical Arts in Bozeman, a state "normal school" or teacher training campus in Dillon, and a School of Mines in Butte.[5] However, the state's coffers were so low that the School of Mines, authorized in 1893, did not open until 1898, and the Bozeman campus faced immediate financial problems when the State Treasurer refused to release funds.[6] The 1893 Legislature also enacted legislation requiring the State Board of Education to organize and select the site for the permanent location of the state university in Missoula[7] and in 1911 and 1913 enacted legislation establishing the law school and the forestry school as departments of the state university in Missoula.[8]

In 1914, in response to criticism about the weakness of higher education and planning, the Board hired its first chancellor.[9] Less than a year later, however, the Legislature enacted legislation to abolish the position, action that was subsequently vetoed by the Governor.[10] During the economic depression of the 1920s, the Board in 1923 limited enrollment because the four existing campuses lacked the buildings necessary to accommodate the current student numbers.[11] Notwithstanding the economic depression and the lack of buildings and adequate operating budgets for existing campuses, the 1925 Legislature approved the establishment of two new campuses in Havre and Billings.[12] As a result, the Legislature reduced funds available to the four existing campuses and forced the Board of Examiners to freeze its funding.[13] A 1929 report

revealed that Montana was spending one-third less on its public campuses than any other state of similar age.[14] In 1930, despite the Depression, the Board persuaded Montana voters to approve a higher education mill levy increase and a new $4 million bond.[15] After World War II, increasing enrollment exceeded the Board's ability to manage or fund the demand and led to voter approval of a large mill levy increase in 1948.[16] In 1956, the Board, because of rising enrollment, responded by imposing the largest tuition and fee increase in the state's history and raised tuition again 2 years later in 1958.[17]

In addition to its financial troubles over the years, the State Board of Education's history includes a pattern of academic and personnel crises including, for example, the firing of an economics professor for publishing a report in 1919 that advocated the increased taxation of Montana's mining interests, the terminations in 1926 of an English professor for assisting a student with a creative writing journal during his spare time and a Business School faculty member for feuding with the university president, and the firing of numerous faculty in the late 1930s who failed to comply with a Board rule requiring "proper standards" in the selection, purchase, distribution, and use of all books, periodicals, and plays on the campuses or who publicly criticized the Board.[18]

Despite a history plagued by chronic financial problems, documented incidences of academic freedom violations, labor strife, political partisanship, and lack of public confidence, the legal structure of the State Board of Education remained unchanged from 1889 to 1972. In 1958, however, a significant development regarding the governance of higher education occurred when an expert from the University of Utah recommended that Montana adopt a separate Board of Regents with either corporate or constitutionally autonomous status.[19] By the time a Constitutional Convention was called in 1972, many Montanans were demanding stronger leadership in public higher education.

The framers of the 1972 Constitution studied the higher education governance systems of many other states before finally concluding that a Board of Regents model would provide Montana

with a system free from legislative and bureaucratic intrusions. From all the models studied, the framers ultimately chose the Michigan system of governance, which had the most constitutionally autonomous system in the country, as the model for creation of an autonomous Board of Regents.[20] The delegates debated and rejected many proposed amendments intended to weaken the proposed Board's autonomy, including several amendments aimed at restoring the Legislature's control over the University System's finances and administrative decision-making.[21] Constitutional Convention transcripts also reveal that delegates discussed that the "power of the purse", plus audit authority, was the only control that the delegates intended for the Legislature to have over higher education appropriations.[22] Since the Legislature had constitutional control over state funds, the Board would be required to draw educational funds through the State Treasurer.

Following the Convention, the people of Montana subsequently adopted the 1972 Constitution, including Article X, section 9, which, in part, provided:

> (2) (a) The government and control of the Montana university system is vested in a board of regents of higher education ***which shall have full power, responsibility, and authority to supervise, coordinate, manage and control the Montana university system*** and shall supervise and coordinate other public educational institutions assigned by law. . . . (emphasis added)

With the creation of a separate board for higher education, the governance of the Montana University System was transformed from a purely legislative creation to a constitutional department. The function of defining the powers and duties of the Board shifted from one of absolute legislative prerogative to that of a Board limited only by the express language of the Montana Constitution itself. Under the new Constitution, the role of the Legislature in higher education was narrowed from one of defining all powers and duties of a State Board of Education to one of overseeing the functions of appropriations and audit, setting by statute the terms of office of members, and assigning additional educational institutions to the control of the new Board of Regents. The Senate was given the exclusive function of confirming gubernatorial appointments to the Board.[23]

The intent of the framers of the 1972 Constitution as to who has which powers and duties is further evidenced by comparing the powers of the Board of Regents under the provisions of Article X, section 9, with those granted the State Board of Public Education under Article X, section 9. Article X, section 9(3)(a)[24] expressly provides that while general supervision over the public school system rests in the Board of Public Education, the Legislature has the prerogative to provide other duties to the Board. No similar language is found in the provisions of Article X, section 9, concerning the Board of Regents.

After adoption of the 1972 Montana Constitution, many of the statutes enacted by the Legislature under the 1889 Constitution were either repealed or amended to remove laws mandating specific action in the area of university curricula or personnel.[25] Currently, Title 20, chapter 25, MCA, reflects the Legislature's responsibility in setting public policy in higher education and financial accountability, while recognizing the Board's authority under Article X, section 9, to supervise, coordinate, manage, and control the University System.

Part II

The Appropriation Power of the Legislature

The power to appropriate is a long-established, well-recognized power of the Legislature.[26] Article V, section 34, of the 1889 Montana Constitution provided that "[n]o money shall be paid out of the treasury except upon appropriations made by law . . ." This language was later adopted in Article VIII, section 14, of the 1972 Montana Constitution.[27] The term "appropriation", as used in the Constitution, has been defined by the Montana Supreme Court to mean "authority from the law-making body in legal form to apply sums of money out of that which may in be in the treasury in a given year, to specified objects or demands against the state".[28]

In addition to changing the governance of higher education in the 1972 Constitution, the framers

also broadened the scope of the Legislature's appropriation power. Article VI, section 9, requires the Governor to submit to the Legislature a budget "setting forth in detail all operating funds the proposed expenditures and estimated revenue of the state". Article VIII, section 9, provided that "Appropriations by the legislature shall not exceed anticipated revenue", while Article VIII, section 12, states:

> **Strict accountability.** The legislature shall by law insure strict accountability of all revenue received and money spent by the state and counties, cities, towns, and all other local governmental entities.

However, prior to adoption of the new Constitution, the Legislature in 1963 enacted the Treasury Fund Structure Act, which contained in section 79-409, R.C.M. 1947, as its stated purpose:

> . . . to make possible the full utilization of modern accounting methods, to provide the legislative assembly with a greater measure of control over public moneys, and to enable the financial records of the state to accurately reflect governmental costs and revenues.

The current purpose of the Treasury Fund Structure Act, now codified in section 17-2-101, MCA, is not significantly different. Its stated purpose is to simplify the accounting system and treasury fund structure of the state, to make possible the full utilization of modern accounting methods, to provide the legislature with a greater measure of control over public money, and to enable the financial records of the state to accurately reflect the state's revenue, expenditures, expenses, and financial position in accordance with generally accepted accounting principles.

Section 79-410, R.C.M. 1947, of the Treasury Fund Structure Act provided for nine funds in the state treasury: (1) general fund; (2) earmarked revenue fund; (3) sinking fund; (4) federal and private revenue fund; (5) federal and private grant clearance fund; (6) bond proceeds and insurance clearance fund; (7) revolving fund; (8) trust and legacy fund; and (9) agency fund.

Section 79-410(4), R.C.M. 1947, provided:

> (4) Federal and private revenue fund. The federal and private revenue

fund consists of all expendable moneys deposited in the state treasury from federal or private sources, including trust income, which are to be used for the operation of state government.

Under current law, section 17-2-102(1)(a)(ii), MCA, derived from the original section 79-410(4), R.C.M. 1947, provides:

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(ii) the special revenue fund type, which accounts for the proceeds of specific revenue sources (other than expendable trusts or major capital projects) that are legally restricted to expenditure for specified purposes. The financial activities of the special revenue fund type are subdivided, for operational purposes, into the following funds to serve the purpose indicated:

(A) The state special revenue fund consists of money from state and other nonfederal sources deposited in the state treasury that is earmarked for the purposes of defraying particular costs of an agency, program, or function of state government and money from other nonstate or nonfederal sources that is restricted by law or by the terms of an agreement, such as a contract, trust agreement, or donation.

(B) The federal special revenue fund consists of money deposited in the treasury from federal sources, including trust income, that is used for the operation of state government.

Additionally, section 17-2-102, MCA, provides for the following fund categories and types:

The governmental fund category, which includes the:

(1) general fund;

(2) special revenue fund type;

(3) capital projects fund type; and

(4) debt service fund type.

The proprietary fund category, which includes the:

(1) enterprise fund type; and

(2) internal service fund type.

The fiduciary fund category, which includes the:

(1) expendable trust fund type;

(2) nonexpendable trust fund type;

(3) investment trust fund type;

(4) pension trust fund type; and

(5) agency fund type.

The higher education funds, which include the:

(1) current fund;

(2) student loan fund;

(3) endowment fund;

(4) annuity and life income fund;

(5) plant fund; and

(6) agency fund.

Pursuant to its authority to ensure strict accountability, the Legislature enacted section 17-6-105, MCA, which directs the deposit of money in the state treasury as follows:

17-6-105. State treasurer as treasurer of state agencies -- deposits of money. (1) The state treasurer is designated the treasurer of every state agency and institution.

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(2) All state agencies and institutions shall deposit all money, credits, evidences of indebtedness, and securities either:

(a) in banks, building and loan associations, savings and loan associations, or credit unions located in the city or town in which the agencies and institutions are situated, if there is a qualified bank, building and loan association, savings and loan association, or credit union in the city or town as designated by the state treasurer with the approval of the board of investments; or

(b) with the state treasurer.

(3) Each bank, building and loan association, savings and loan association, or credit union shall pledge securities sufficient to cover 50% of the deposits at all times.

(4) The deposits must be made in the name of the state treasurer, must be subject to withdrawal at his option, and must draw interest as other state money, in accordance with the provisions of this part.

(5) Nothing in this chapter shall impair or otherwise affect any covenant entered into pursuant to law by any agency or institution respecting the segregation, deposit, and investment of any revenues or funds pledged for the payment and security of bonds or other obligations authorized to be issued by the agency, and all the funds must be deposited and invested in accordance with the covenants notwithstanding any provision of this chapter.

(6) Except as otherwise provided by law, all money, credits, evidences of indebtedness, and securities received by a state agency or institution must be deposited either with the state treasurer or in a depository approved by the state treasurer each day when the accumulated amount of coin and currency requiring deposit exceeds $100 or total collections exceed $500. All money, credits, evidences of indebtedness, and securities collected must be deposited at least weekly.

(7) Notwithstanding any other provision of state law, when it is determined to be in the

best financial interest of the state, the department may require any money received or collected by any agency of the state to be immediately deposited to the credit of the state treasurer.

While subsection (1) expressly authorizes the deposit of money into either a private bank or other authorized financial institution, subsection (7) provides that when determined to be in the "best financial interest of the state", money collected or received by any state agency, including the Board of Regents, must be deposited to the credit of the State Treasurer. Since better interest rates may be obtained by the state, it is arguably in the "best financial interest of the state" that all money be deposited in a state rather than private account. As a result, the Board of Regents by law is required to deposit all money in the state treasury.

Section 17-8-101, MCA, provides limits on the disbursement of money from the state treasury, and states:

17-8-101. Appropriation and disbursement of money from treasury. (1) For purposes of complying with Article VIII, section 14, of the Montana constitution, money deposited in the general fund, the special revenue fund type (except money deposited in the treasury from nonstate and nonfederal sources restricted by law or by the terms of an agreement, such as a contract, trust agreement, or donation), and the capital projects fund type, with the exception of refunds authorized in subsection (4), may be paid out of the treasury only on appropriation made by law.

(2) Subject to the provisions of subsection (8), money deposited in the enterprise fund type, debt service fund type, internal service fund type, expendable trust fund type, agency fund type, and state special revenue fund from nonstate and nonfederal sources restricted by law or by the terms of an agreement, such as a contract, trust agreement, or donation, may be paid out of the treasury:

(a) by appropriation; or

(b) under general laws, or contracts entered into in pursuance of law, permitting the disbursement.

(3) The pension trust fund type is not considered a part of the state treasury for appropriation purposes. Money deposited in the pension trust fund type may be paid out of the treasury pursuant to general laws, trust agreement, or contract.

(4) Money paid into the state treasury through error or under circumstances such that the state is not legally entitled to retain it and a refund procedure is not otherwise provided by law may be refunded upon the submission of a verified claim approved by the department.

(5) Authority to expend appropriated money may be transferred from one state agency to another, provided that the original purpose of the appropriation is maintained. The office of budget and program planning shall report semiannually to the legislative finance committee

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concerning all appropriations transferred under the provisions of this section.

(6) Fees and charges for services deposited in the internal service fund type must be based upon commensurate costs. The legislative auditor, during regularly scheduled audits of state agencies, shall audit and report on the reasonableness of internal service fund type fees and charges and on the fund equity balances.

(7) The creation of accounts in the enterprise fund or the internal service fund must be approved by the department, using conformity with generally accepted accounting principles as the primary approval criteria. The department shall report annually to the office of budget and program planning and the legislative finance committee on the nature, status, and justification for all new accounts in the enterprise fund and the internal service fund.

(8) Enterprise and internal service funds must be appropriated if they are used as a part of a program that is not an enterprise or internal service function and that otherwise requires an appropriation. An enterprise fund that transfers its ending fund balance to the general fund is subject to appropriation. The payment of funds into an internal service fund must be authorized by law.

The Legislature defined an appropriation made by law in section 17-7-501, MCA, as follows:

17-7-501. Appropriations -- type. There are three types of appropriations within the meaning of "appropriation made by law" as used in Article VIII, section 14, of the Montana constitution:

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(1) temporary appropriations enacted by the legislature as part of designated appropriation bills or sections designated as appropriations in other bills;

(2) temporary appropriations made by valid budget amendment; and

(3) statutory appropriations made by permanent law in conformance with 17-7-502.

Historically, the power to appropriate goes hand in hand with the legislative power to exercise control over expenditures through itemization.[29] After 2 years of lump-sum appropriations, the United States Congress, for example, began to itemize expenditures in its appropriation acts in 1793. Likewise, in Montana, itemization of appropriations dates back to 1891. This historically recognized itemization of appropriations is reflected in the 1972 Montana Constitution as Article VIII, section 9, requiring a balanced budget, Article VIII, section 12, providing a system ensuring strict accountability, Article V, section 10, fulfilling the audit responsibility, and Article X, section 9(1), requiring the State Board of Education to submit unified budget requests.

Part III

Authority of Board of Regents vs. Legislative Appropriation Power

Only 3 years after adoption of the 1972 Constitution, the Montana Supreme Court in the companion cases of State ex rel. Judge v. Legislative Finance Committee[30] and Board of Regents v. Judge,[31] had its first opportunity to analyze both the authority of the newly formed Board of Regents and the scope of the appropriation power of the Montana Legislature as a result of actions taken by the 1973 and 1975 Montana Legislatures.

During the 1973 Regular Session, the Montana Legislature enacted House Bill No. 55, which both appropriated money from the general fund and earmarked revenue accounts to various state agencies, including units of the University System, for the biennium ending June 30, 1975. Some agencies received additional funds during the biennium from the federal government, private donations, and interests, rents, and royalties from state lands.

House Bill No. 55 contained the following conditions and limitations on the expenditures of money:

> **Section 8.** If the operation of a state agency is financed by an appropriation or appropriations from the general fund as well as by appropriations from other sources, the ***funds provided by appropriation from the general fund shall be decreased by the amount that the funds received from other sources exceeds the amount from other sources appropriated by the legislature in the 1975 biennial budget***, provided that:
>
> (1) the decrease does not jeopardize the receipt of funds to be received from other sources; and
>
> (2) this section shall not apply to any excess funds if they are to be expended for a new or expanded program approved by the governor, or his designated representative upon a request submitted to him through the budget bureau.
>
> **Section 11.** In addition to the amounts specifically appropriated by this act, there is hereby appropriated to the Montana university system units all federal funds for existing programs, and those funds related to various supporting facilities and

organizations such as auxiliary enterprises. ***All other moneys received from all other sources may be made available by an approved budget amendment***.

Section 14. The provisions set forth in this section are limitations on the appropriations made in this act . . . . It is the purpose of the legislature in enacting this bill only to appropriate funds and to restrict and limit by its provisions [sic] the amount and conditions under which the appropriations can be expended. Except as otherwise provided in this act, the expenditures of appropriations are hereby subject to the following general and specific provisions:

(1) . . .

(2) . . .

(3) All expenditures of funds appropriated by this act shall be made in accordance with the provisions of 82-109, R.C.M. 1947, which specifies that ***expenditures shall be applied against nongeneral fund moneys before general fund moneys***. (emphasis added)

At the close of the biennium ending June 30, 1975, five of the units of the Montana University System had funds remaining in their respective earmarked revenue accounts. These balances were not used to offset expenditures from the general fund as required by section 8 of House Bill No. 55, nor were they expended prior to expending the general fund appropriation as required by section 14(3) of House Bill No. 55.

As a result, when the 1975 Legislature convened, it enacted House Bill No. 271, which appropriated money by various line items from various state operating funds to the Board of Regents for the University System for the biennium ending June 30, 1977, and contained a provision requiring an offset and a spending priority provision similar to House Bill No. 55. In addition, House Bill No. 271 also made the expenditure of appropriations contingent upon the Board of Regents certifying that it would comply with several specific conditions, including the spending priority provision. Section 12 of the bill also required the Regents to certify to the Budget Director compliance with the provisions of House Bill No. 271 regarding limits on university president salary increases and expenditure of all monies received from sources other than the general fund. Senate Bill No. 401 provided that no state agency could spend in excess of an appropriation except under authority of a budget amendment approved by the Legislative Finance Committee. As a result, the authority for budget amendments under both House Bill No. 271 and Senate Bill No. 401 was vested in the Legislative Finance Committee.

In August, the 1975 Legislature convened in special session and amended House Bill No. 271 in House Bill No. 1, by adding section 13 to House Bill No. 271:

> **Section 13.** In addition to the appropriations contained in this act, all other monies received from sources other than the general fund and which were not available for consideration by the legislature are hereby appropriated. Such monies may be made available for expenditure only by a budget amendment approved by the legislative finance committee.

Claiming that these legislative acts infringed on the constitutional powers granted the Regents under Article X, section 9, of the 1972 Constitution, the Board of Regents refused to certify compliance with House Bill No. 271. After the Budget Director voided the University System appropriation, two separate lawsuits were filed related to House Bill No. 271 and Senate Bill No. 401--one by the Governor against the Legislative Finance Committee, alleging that the statute empowering the Finance Committee to approve budget amendments unconstitutionally delegated a power reserved to the entire Legislature, executive officer, or agency, and a second by the Board of Regents against the Governor, alleging that actions by the Legislature and signed by the Governor unconstitutionally infringed on the powers granted to the Regents under Article X, section 9, of the 1972 Constitution.

During oral arguments, the Regents cited changes in the provisions of the 1972 Constitution and argued that the University System and the Board constituted a fourth branch of government with powers that were vested completely in the Regents to the exclusion of the legislative and executive bodies.[32] Rejecting that argument, the Court in Board of Regents held that the powers granted the Regents in Article X, section 9, must be read in conjunction with the powers granted the Legislature in Article III, section 1, which divided governmental power into the Legislative, Executive, and Judicial Branches and prohibited encroachment, in Article V, section 1, which vested legislative power exclusively in an elected legislative body, and in Article VIII, section 12, which required the Legislature to insure strict accountability of all revenue received and money spent by the state and counties, cities, towns, and all other local governmental entities.[33]

In discussing the constitutional powers involved, the Court in Board of Regents stated:

> Our task then is ***to harmonize in a practical manner the constitutional power of the legislature to appropriate with the constitutional power of the Regents to supervise, coordinate, manage and control the university system***. At the outset, we note that ***there is not always a clear distinction between these powers*** . . . .[34]

The Court in Board of Regents acknowledged that the 1972 Montana Constitution had broadened the scope of the Legislature's appropriation powers. Previous court decisions had limited the scope of the appropriation power to the general fund. The Court cited Article VI, section 9, which required the Governor to submit to the Legislature a budget "setting forth in detail for all operating funds the proposed expenditures and estimated revenue of the state", Article VIII, section 9, which prohibited appropriations by the Legislature from exceeding anticipated revenue, and Article VIII, section 12, which required strict accountability of revenue and expenditures. In reviewing the separation of powers provisions, the Court in Legislative Finance Committee held that, notwithstanding Article VI, section 9, which requires the Governor to submit a budget to the Legislature, the budget in Montana is a legislative budget not an executive budget.[35] The Court added that the power to adjust and finalize a budget resides in the Legislative body as a whole and constitutionally cannot be delegated to a legislative committee.[36]

Additionally, in addressing the scope of appropriation power, the Court in Board of Regents specifically stated:

> Thus the legislative ***appropriation power now extends beyond the general fund and encompasses all those public operating funds of state government***. (emphasis added)[37]

The Court went on to limit the Legislature's appropriation power as follows:

> However we emphasize that ***the power to appropriate does not extend to private funds received by state government which are restricted by law, trust agreement***

or contract. Accordingly, we limit subsection (4) of section 79-410 which provides:

"(4) Federal and private revenue fund. The federal and private revenue fund ***consists of all expendable moneys deposited in the state treasury from federal or private sources, including trust income***, which are to be used for the operation of state government."

This provision, in view of our conception of the appropriation power, ***cannot be used as a basis for legislative control over expenditures of the types of private moneys enumerated*** above and is invalid to the extent it may be so read. (emphasis added)[38]

The Court went on to construe section 12(4) of House Bill No. 271, Laws of 1975, which provided:

(4) ***All moneys*** collected or received by university system units subject to this act ***from any source*** whatsoever [sic], including federal grants for research and operations, ***and any moneys received from a foundation*** shall be deposited in the state treasury pursuant to the provisions of Title 79 R.C.M. 1947, ***except that the department of administration may, pursuant to section 79-603, R.C.M. 1947, permit any university system unit subject to this act to retain in its possession moneys that would otherwise be deposited in the state treasury, provided that the anonymity of private foundation donors shall be maintained and that private donations shall not be used as an offset to general fund appropriations***. (emphasis added)[39]

In construing the bolded language, the Court reiterated its earlier holding:

Based on our earlier discussion of the legislative appropriation power, ***certification cannot be used as a boot-strapping device to gain legislative control over private moneys***. As noted heretofore, ***private moneys restricted by law, trust agreement, or contract are beyond the appropriation power***. To the extent then that the certification requirement of Section 12(4) attempts to exert any control over such private moneys or to grant any discretion over such funds to the department of administration, it is unconstitutional.[40]

Under current law, section 17-2-102(1)(a)(ii), MCA, is derived from the original section 79-410(4), R.C.M. 1947, the section construed in Board of Regents. The section provides:

(ii) the special revenue fund type, which accounts for the proceeds of specific revenue sources (other than expendable trusts or major capital projects) that are legally restricted to expenditure for specified purposes. The financial activities of the special revenue fund type are subdivided, for operational purposes, into the following funds to serve the purpose indicated:

(A) The state special revenue fund consists of money from state and other nonfederal sources deposited in the state treasury that is earmarked for the purposes of defraying particular costs of an agency, program, or function of state government and money from other nonstate or nonfederal sources that is restricted by law or by the terms of an agreement, such as a contract, trust agreement, or donation.

(B) The federal special revenue fund consists of money deposited in the treasury from federal sources, including trust income, that is used for the operation of state government.

Private money received by the state and restricted by law, trust agreement, or contract is deposited in the state treasury, but is not subject to the Legislature's appropriation power.

Additionally, the Court held:

> . . . legislative control of higher education through the appropriation process remains. The Regents are a constitutional body in Montana government ***subject to the power to appropriate and the public policy of this state***.[41]
>
> However, ***the legislature cannot do indirectly through the means of line item appropriations and conditions what is impermissible for it to do directly. Line item appropriations become constitutionally impermissible when the authority of the Regents to supervise, coordinate, manage and control the university system is infringed by legislative control over expenditures***. (emphasis added)[42]

The Montana Supreme Court adopted the analysis of the Minnesota Supreme Court in State ex rel. University of Minnesota v. Chase, concerning the propriety of legislative conditions to University System appropriations as follows:

> . . . At the one extreme, the Legislature has no power to make effective, in the form of a law, a mere direction of academic policy or administration. At the other extreme ***it has the undoubted right within reason to condition appropriations as it sees fit. "In such case the regents may accept or reject such appropriation. . . . If they accept, the conditions are binding upon them***." (emphasis added)[43]

The Montana Supreme Court determined that conditions attached to appropriations must be

individually scrutinized to determine their propriety.[44]

The Montana Supreme Court quoted from Regents of University of Michigan v. State, with respect to the types of conditions that could be attached to appropriations.[45] Conditions found valid included business and accounting procedures, annual reports, fair and equitable distribution among departments, and maintenance of departments. Conditions found invalid included a requirement to move a department and limiting the amount of funds spent on a particular department. The Court in Board of Regents applied this analysis to find invalid the Legislature's attempt in House Bill No. 271 to control the level of college presidents' salaries. The Court noted that inherent in the constitutional provision granting the Regents their power is the realization that the Board of Regents is the competent body for determining priorities in higher education. An important priority is the hiring and keeping of competent personnel.[46]

A year after the Board of Regents decision, Attorney General Woodahl was asked in 1976 by Commissioner of Higher Education Pettit for an opinion on whether, under provisions of House Bill No. 55, the University System could carry over earmarked revenues in the form of student fees from the 1973-1975 biennium for expenditure by approved budget amendment during the 1975-1977 biennium or whether it must use the balances to reduce general fund expenditures during the 1973-1975 biennium.[47] Section 8 of House Bill No. 55, provided:

> **Section 8.** If operation of a state agency is financed by an appropriation or appropriations from the general fund as well as by appropriation from other sources, the ***funds provided by appropriation from the general fund shall be decreased by the amount that the funds received from other sources exceeds the amount from other sources appropriated by the legislature in the 1975 biennial budget***, provided that:
>
> (1) the decrease does not jeopardize the receipt of the funds to be received from other sources; and
>
> (2) this section shall not apply to any excess funds if they are to be expended for a new or expanded program approved by the governor, or his designated representative upon a request submitted to him through the budget bureau.

Additionally, sections 11 and 14, respectively, provided:

> **Section 11.** In addition to the amounts specifically appropriated by this act, there is hereby appropriated to the Montana university system units all federal funds for existing programs, and those funds related to various supporting facilities and organizations such as auxiliary enterprises. ***All other moneys received from all other sources may be made available by an approved budget amendment***.
>
> **Section 14**. . . . It is the purpose of the legislature in enacting this bill only to appropriate funds and to restrict and limit by its provisions [sic] the amount and conditions under which the appropriations can be expended. Except as provided in this act, the expenditures of appropriations are hereby subject to the following general and specific provisions:
>
> (1) . . .
>
> (2) . . .
>
> (3) All expenditures of funds appropriated by this act shall be made in accordance with the provisions of 82-109, R.C.M. 1947, which specifies that ***expenditures shall be applied against nongeneral fund moneys before general fund moneys.***

Audits of the various university units disclosed funds in the earmarked revenue and income accounts that had been earmarked and received in the 1973-1975 biennium and carried over to the 1975-1977 biennium. The funds were unanticipated nongeneral funds that were not used to offset the general fund nor were they expended prior to expenditure of the general fund appropriation.

Attorney General Woodahl noted that in Regents of University of Michigan v. State, a case cited favorably in Board of Regents, the Michigan Court of Appeals addressed itself to a similar statute that had the same effect as section 8 of House Bill No. 55.[48] The Michigan statute imposed conditions and limitations on appropriations granted by the Legislature to the Michigan Board of Regents as follows:

> **Section 26.** If revenue from tuition and student fees . . . exceeds in the aggregate the amount reported by the institutions of higher education in their notification of April 15, 1971 for Michigan resident students as a result of an increase in student fees or tuition the general fund subsidy appropriated for the support of that branch or institution of higher education shall automatically be reduced by the amount by which such revenue exceeds the amount reported.

Quoting the trial judge in the lower court, the Michigan Court of Appeals noted that:

> Section 26 provides that the general appropriation will automatically be reduced by an amount equal to any monies received by plaintiffs as a result of an increase in student fees or tuition above that reported on April 15, 1971. The effect of such a provision is to prohibit the plaintiffs from increasing their revenues by increasing tuition rates and student fees, because any increase by the plaintiffs will automatically result in an equal decrease in funds already appropriated.

The Michigan lower court concluded:

> Since the Legislature could not directly prohibit plaintiffs from increasing their tuition rates or student fees, it cannot do so indirectly by deducting any increases from the funds appropriated to the plaintiffs. Further, as was previously stated, once the legislature makes a general appropriation to plaintiffs it becomes the property of the plaintiffs and passes beyond the control of the legislature.

Attorney General Woodahl then held that section 8 of House Bill No. 55, if enforced, would have the same effect on the units of the Montana University System as section 26 had on the University of Michigan. Quoting Board of Regents, the Attorney General ruled the offset requirement unconstitutional as the Legislature would be trying to do indirectly what it could not do directly--establish tuition rates for the University System.[49]

Part IV

Summary

The 1889 Constitution vested control and supervision in the State Board of Education, but gave full authority to the Legislature by limiting the Board's powers to those that "shall be prescribed and regulated by law". Under this provision, it was the Legislature that not only prescribed the duties and powers of the State Board of Education, but also, after some of the most vocal debates of the Constitutional Convention, statutorily established the location of the various units and departments of the University System. With adoption of the 1972 Constitution, however, a newly created Board of Regents was given "full power, responsibility, and authority to supervise, coordinate, manage and control the Montana university system". As a result, the Legislature that had the authority to decide on the number and location of the various units of the University

System under the 1889 Constitution ironically found itself, with adoption of the 1972 Constitution, without any authority to eliminate or directly alter the makeup any of those legislatively created units.

Until 1996, there had been no attempts to alter the power granted the Board of Regents under the 1972 Constitution. On November 5, 1996, the Legislature submitted to the electorate Constitutional Amendment No. 30, which, if approved, would have seen a return to the 1889 system of higher education governance. As drafted, it proposed to amend the Constitution to eliminate the Board of Regents, the State Board of Education, and the Commissioner of Higher Education and replace them with a Department of Education, with a Director appointed by the Governor. The constitutional referendum also proposed creation of an eight-member appointed State Education Commission with duties determined by the Legislature. The voters defeated the referendum by a margin of 63% to 37%.

Without a constitutional amendment similar to CA 30 to either restrict the autonomy of the Board of Regents or to perhaps expand the Legislature's financial authority over nongeneral funds now constitutionally controlled by the Board of Regents, the Court in Board of Regents made it clear that the constitutional power of the Board of Regents to "supervise, coordinate, manage and control the Montana university system" must be harmonized with the constitutional powers of the Legislature.

While the current Constitution vests autonomous power over the University System to the Board of Regents, the power of appropriation belongs exclusively to the Legislature as a whole and cannot be delegated to another branch of government or to a Legislative committee. While previous court decisions had limited the scope of the appropriation power to the general fund, the Court in Board of Regents acknowledged that the 1972 Constitution expressly broadened the scope of the Legislature’s appropriation power to encompass all public operating funds of state government.

In analyzing the Legislature's responsibility in appropriating funds to the Board of Regents, one can argue that since the people of Montana adopted as a state goal in Article X, section 1(1), of the 1972 Constitution "to establish a system of education which will develop the full educational potential of each person", the Legislature may be expected to provide some type of state funding for each level of the state's public education system. However, unlike language found in Article X, section 1(3), which specifically requires the Legislature to "fund and distribute in an equitable manner to the school districts the ***state's share of the cost of the basic elementary and secondary school system***", there is no mandate that the Legislature provide the University System with any particular level of funding. Once the Legislature has protected the proceeds from the school lands granted by the United States as a condition of statehood as required by Article X, sections 2 and 3, of the Montana Constitution, the Legislature is not under any legal obligation to fund the University System with any particular amount from the general fund.

However, should the Legislature elect to appropriate public state or federal money to the University System, it may do so using any method, including line item appropriations, so long as the appropriation and any condition comply with the guidelines adopted by the Montana Supreme Court in Board of Regents. Acknowledging that there was not always a clear distinction between the powers of the Board of Regents and the Legislature, the Court provided the following guidelines that the Legislature must consider in the appropriation process:

> **(1) The Board of Regents is subject to the Legislature's appropriation power and public policy, but the Legislature cannot do indirectly through the means of line item appropriations and conditions what is impermissible for it to do directly.**

Line item appropriations have been recognized by the Court as vital to the legislative decision-making process involved in providing a balanced budget, in providing for strict accountability, in fulfilling the constitutionally required audit responsibilities, and in ensuring that the State Board of Education comply with the constitutional mandate to submit unified budget requests. However, line item appropriations become constitutionally impermissible when the authority of the Board of Regents to "supervise, coordinate, manage and control the university system" is

infringed by legislative control over expenditures.

(2) The Legislative appropriation power extends beyond the general fund and encompasses all those public operation funds of state government, but does not extend to private funds received by state government that are restricted by law, trust agreement, or contract.

The Legislature's authority to "appropriate" cannot be confused with its constitutional responsibility to strictly account for all revenue and expenditures. To ensure strict accountability as required by the Constitution and to enable the state's financial records to accurately reflect governmental revenue and expenditures and when it is determined to be in the "best financial interest of the state" under section 17-6-105(7), MCA, state agencies and institutions, including the Board of Regents, are required to deposit all money received to the credit of the State Treasurer rather than in a private bank. As a result, some private money received by the Board is currently deposited in state special revenue accounts for auditing and accounting purposes. However, the power of the Legislature to ensure strict accountability of all state funds cannot be used as a "bootstrapping device" to gain legislative control over private money. The fact that private money, such as tuition, student fees, or foundation donations, is deposited into state special revenue accounts does not "convert" the money from private to public funds that are subject to the appropriation power of the Legislature. In other words, the Legislature cannot appropriate money over which it has no constitutional authority.

(3) The Legislature may, within reason, attach conditions to University System appropriations that, if accepted by the Board of Regents, bind them to the conditions.

Under this guideline, the key phrase is "within reason". The courts have sustained conditions that require, on penalty of losing part of the appropriation, such things as annual reports to the Governor, fair and equitable distribution of an appropriation among university departments, and loyalty oaths from teachers and that subject nonteaching employees to workers' compensation laws. On the other hand, as supported by the Court in Board of Regents, a Legislature cannot "condition" money to require that a university move a department or limit salary increases and cannot attempt to *directly* control the amount of tuition charged for attendance. As noted by the

Court in Board of Regents, the problem of delineating the area forbidden to the Legislature in conditioning appropriations to the University System is not easily resolved and, arguably, any decision regarding appropriations affects the Board of Regents' management of the University System to some degree. As a result, the Court stated that *each appropriation condition must be individually scrutinized to determine its propriety*. The fact that the Legislature may propose numerous conditions and require blanket compliance does not in itself infringe upon the Board's constitutional powers.

In conclusion, under the 1972 Montana Constitution, the Board of Regents has "full power, responsibility, and authority to supervise, coordinate, manage and control the Montana university system". However, those constitutional powers do not exist in a vacuum, but must instead be harmonized with the Legislature's constitutional power to appropriate, set public policy, and ensure strict accountability of all state revenue and expenditures. Moreover, the problem in identifying and deciphering constitutional authority is not limited to the Legislature and the Board of Regents. Currently, the courts are addressing whether the authority over state school lands constitutionally lies with the Board of Regents or the Board of Land Commissioners.

1. "Voters Wisely Reject Proposed Constitutional Amendment 30 To Eliminate The Montana Board of Regents", Aronofsky, 58 Mont. L. Rev. 333, 347 (1997).
2. Ibid.
3. See Sec. 7, p. 159. L. 1893; Sec. 6, p. 174, L. 1893; and Sec. 7, p. 175, L. 1893; and Sec. 12, p. 176, L. 1893;.
4. Section 17, Montana Enabling Act, provided:

> To the state of Montana: For the establishment and maintenance of a school of mines, one hundred thousand acres; for state normal schools, one hundred thousand acres; for agricultural colleges, in addition to the grant hereinbefore made for that purpose, fifty thousand acres; for the establishment of a state reform school, fifty thousand acres; for the establishment of a deaf and dumb asylum, fifty thousand acres; for public buildings at the capital of the state, in addition to the grant hereinbefore made for that purpose, one hundred and fifty thousand acres.

5. See Sec. 1, p. 171, L. 1893; Sec. 1, p. 177, L. 1893; and Sec. 1. p. 180, L. 1893.
6. Aronofsky, supra, at p. 349.
7. See Sec. 1, p. 173, L. 1893.
8. See Sec. 1 and 2, Ch. 31, L. 1911, establishing law school as department of state university in Missoula; Secs. 1 and 2, Ch. 131, L. 1913, establishing forestry school as department of state university in Missoula.
9. See Aronofsky, supra, note 1, at p. 352.
10. Ibid.
11. Aronofsky, supra, at p. 354-355.
12. Ibid., p. 355.
13. Ibid.
14. Aronofsky, supra at p. 356.
15. Ibid.
16. Aronofsky, supra at p. 360.
17. Id. at 361.
18. Aronofsky, supra, at p. 350-354, citing Edward B. Chenette, "The Montana State Board of Education: A Study of Higher Education in Conflict, 1884-1959(1972)(unpublished Ed. D. dissertation, University of Montana)(on file with the University of Montana Library).
19. Ibid., p. 361.
20. Ibid., p. 365, citing Committee on Education and Public Lands, Montana Constitutional Convention, IX Transcripts 6473 (1972)(unpublished version); See also, Schaefer, "The Legal Status of the Montana University System Under The New Constitution", 35 Mont. L. Rev. 189-209 (1974).
21. Schaefer, "The Legal Status of the Montana University System Under The New Constitution", 35 Mont. L. Rev. 189, 195-197 (1974) .
22. Ibid, p. 198.
23. Article X, section 9, of the Montana Constitution, provides:

Section 9. Boards of education. (1) There is a state board of education composed of the board of regents of higher education and the board of public education. It is responsible for long-range planning, and for coordinating and evaluating policies and programs for the state's educational systems. It shall submit unified budget requests. A tie vote at any meeting may be broken by the governor, who is an ex officio member of each component board.

(2) (a) The government and control of the Montana university system is vested in a board of regents of higher education which shall have full power, responsibility, and authority to supervise, coordinate, manage and control the Montana university system and shall supervise and coordinate other public educational institutions assigned by law.

(b) The board consists of seven members appointed by the governor, and confirmed by the senate, to overlapping terms, as provided by law. The governor and superintendent of public instruction are ex officio non-voting members of the board.

(c) The board shall appoint a commissioner of higher education and prescribe his term and duties.

(d) The funds and appropriations under the control of the board of regents are subject to the same audit provisions as are all other state funds.

(3) (a) There is a board of public education to exercise general supervision over the public school system and such other public educational institutions as may be assigned by law. Other duties of the board shall be provided by law.

(b) The board consists of seven members appointed by the governor, and confirmed by the senate, to overlapping terms as provided by law. The governor, commissioner of higher education and state superintendent of public instruction shall be ex officio non-voting members of the board.

24. Section X, section 9(3)(a), Montana Constitution, provides:

> (3)(a) There is a board of public education to exercise general supervision over the public school system and such other public educational institutions as may be assigned by law. Other duties of the board shall be provided by law.

25. See, for example, House Bill No. 21, Ch. 344, L. 1973; House Bill No. 363, Ch. 397, L. 1973.

26. State ex re, Haynes v. District Court, 106 Mont. 470, 476, 78 P.2d 937 (1938); See also State ex. rel. Bonner v. Dixon, 59 Mont. 58, 195 Pac. 841 (1921); State ex rel. Toomey v. Board of Examiners, 74 Mont. 1, 238 P. 316 (1925).

27. Article VIII, Section 14, Montana Constitution, provides:

> **Section 14. Prohibited payments.** Except for interest on the public debt, no money shall be paid out of the treasury unless upon an appropriation made by law and a warrant drawn by the proper officer in pursuance thereof.

28. See State ex rel. Bonner v. Dixon, 59 Mont. 58, 195 Pac. 841, 845 (1921); See also State ex rel. Tipton v. Erickson, 93 Mont. 466, 19 P.2d 227, 229 (1933)(holding that an appropriation is an Act by which a named sum of money is set apart in the treasury and devoted to the payment of particular claims or demands),
29. See Board of Regents, supra, at p. 449-450.
30. 168 Mont. 470, 543 P.2d 1317 (1975).
31. 168 Mont. 433, 543 P.2d 1323 (1975).
32. Ibid., p. 442.
33. Ibid. at 442-443.
34. Ibid. at 444.
35. Legislative Finance Committee, supra at 480.
36. Ibid., p. 477.
37. Board of Regents, supra at 446.
38. Ibid.
39. Ibid., at 452.
40. Ibid.
41. Ibid., p. 449.
42. Ibid., p. 450.
43. Ibid., p. 451.
44. Ibid.
45. Board of Regents, supra, at p. 453.
46. Ibid. at 454.
47. See 36 A.G. Op. 76 (1976).
48. Ibid., p. 476-477.
49. Ibid.